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MULTI–PURPOSE HOLDINGS BERHAD

v.

KETUA PENGARAH HASIL DALAM NEGERI

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL AZIZ MOHAMAD JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: W-01-91-1997]

C

10 FEBRUARY 2006

REVENUE LAW: *Income tax - Assessment - Share transfer tax - Share (Land Based Company) Transfer Tax Act 1984 - Proviso to s. 5 - Whether requirement for approval must be imposed by law - Whether must be construed in favour of taxpayer if ambiguous*

D

CONSTITUTIONAL LAW: *Fundamental liberties - Retrospective legislation - Presumption of constitutionality of statute - Whether an excessively retrospective taxing statute violates citizen's fundamental rights - Federal Constitution, art. 7(1)*

E

The appellant company, through its subsidiaries, owned 40.68% of the issued and paid-up capital of United Malayan Banking Corporation Berhad ("UMBC"). Daan Sdn Bhd and Dani Sdn Bhd ("the purchasers") through their subsidiary owned 51% of the

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issued and paid-up capital of Malaysian French Bank Bhd ("MFB"). On 6 July 1984, an agreement was entered into between the appellant and the purchasers wherein the parties agreed to exchange with each other their respective investments in UMBC and MFB. The shares that formed the subject matter

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of exchange were of companies that owned land. Clause 3 of the agreement made it conditional upon obtaining the approval of all relevant Governmental and regulatory authorities including Bank Negara and the Foreign Investment Committee (FIC). On 3 October 1984, the FIC gave its approval "subject to approval of

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Bank Negara Malaysia being obtained" and on 8 November 1984, Bank Negara approved the transaction. Completion of the agreement took place on 4 December 1984.

In June 1991, the respondent served the appellant a notice of

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assessment requiring the appellant to pay RM15,147,847.10 as share transfer tax under the Share (Land Based Company) Transfer Tax Act 1984 ("the Act"). The Act no longer exists. The

Act was enacted on 31 December 1984 but came into force on 19 October 1984 through a deeming provision. Thus, the Act did not exist on the date of the agreement in question. Section 5 of the Act provided that where the disposal or acquisition of a chargeable asset requires the approval by a Government authority or committee, the date of disposal shall be the date of such approval. The respondent claimed that the Act applied to the agreement in this case because of s. 5, since the agreement was conditional upon the obtaining of Bank Negara and FIC approval and that Bank Negara only gave its approval on 8 November 1984, which is after 19 October 1984 – the deemed effective date of the Act. The respondent's argument was upheld by both the Special Commissioners and the High Court on first appeal. The appellant further appealed.

Held (majority decision, allowing the appeal)
Per Gopal Sri Ram JCA:

(1) The proviso to s. 5 does not make it clear whether it refers to a requirement imposed by law or a requirement of the term of the agreement of disposal. It is therefore ambiguous and must be construed in favour of the appellant as taxpayer. The requirement of which the proviso speaks refers to a requirement imposed by law. So, it is incumbent on revenue to point to a written law which requires an agreement such as the one in the present instance to have the approval of Government. The FIC Guidelines are not law. (paras 11 & 13)

(2) If the Act applied to the appellant, it means that it would have had to file its tax return within one month of the date on which it received Bank Negara's approval, which is not later than 7 December 1984. But that would be a physical impossibility because the Act was not passed by Parliament until 31 December 1984. Yet, the appellant would have breached a provision of the Act that attracts penal consequences. The consequences were practically unjust. It is a well established principle that Parliament is presumed not to intend an unfair or unjust result. Parliament could not have intended such an unjust result. (paras 14, 15 & 16)

(3) The Act must be read harmoniously with the first limb of art. 7(1) of the Federal Constitution which strikes at retrospective penal laws. This approach is in keeping with the presumption that Parliament does not intend its Acts to violate the

A Constitution. There is a strong presumption in favour of the constitutionality of a statute. Hence, a statute must be read harmoniously with the Constitution to avoid any conflict between them which will result in the statute becoming void. Therefore, the Act must be read prospectively to prevent the
B appellant and those similarly circumstanced from becoming retrospectively criminally liable. (paras 17 & 18)

(4) It is well settled that an excessively retrospective taxing statute may be struck down as violative of a citizen's
C fundamental rights. Whether a particular taxing statute is excessively retrospective depends on the facts and circumstances of each case. (para 19)

Per Abdul Aziz Mohamad JCA:

D **(1)** The FIC's approval was not a conditional approval. An approval that is conditional is an approval that is subject to conditions. The FIC was not subjecting its approval to a condition, failure to observe which would render their approval inherently ineffective. (para 44)

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(2) The requirement intended by Parliament in the proviso to s. 5 was not a requirement self-imposed by parties in their agreement. The requirement intended must be the requirement of the law or of something having the force of law. But no
F such requirement was shown to exist. Therefore, the disposal in this case did not require approval by "the Government or an authority or committee appointed by the Government". (para 51)

G **Per Arifin Zakaria JCA (dissenting) (dismissing the appeal with costs):**

(1) The agreement was nothing more than a conditional agreement. A conditional contract is not enforceable until the condition precedent has been fulfilled. Since the approval given
H by FIC was subject to the approval of BNM, until such approval was obtained from BNM the condition remained unfulfilled and thus the agreement could not in the circumstances be enforced. (paras 73, 77 & 78)

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(2) The proviso to s. 5 was broad enough to encompass both situations, irrespective of whether the requirement was a requirement under the law or one under the agreement. (para 80)

(3) The date of disposal here was therefore when the last of the condition was satisfied, that is the date of approval given by BNM, 8 November 1984. Therefore, the disposal fell squarely within provisions of the Act. (para 80)

(4) The penal provision found in the Act did not lead to injustice to the appellant and the purchasers because s. 46(1) of the Act provided that default in furnishing the return was only an offence if the tax payer failed to provide any reasonable excuse for failing to do so. What is reasonable excuse will depend on the facts and circumstances of each case and is broad enough to cover the special facts in this case. (paras 82 & 84)

(5) A taxing law cannot be annulled as unreasonable merely because it is retroactive in its operation. The Act was not unreasonable or excessive in its character or effect or did not, in any manner, infringe on the fundamental rights of the appellant as enshrined in the Constitution. (para 86)

Bahasa Malaysia *translation of headnotes*

Syarikat perayu, melalui syarikat-syarikat anaknya, memiliki 40.68% modal berbayar United Malayan Banking Corporation Berhad ('UMBC'). Daan Sdn Bhd dan Dani Sdn Bhd ('pembeli'), melalui syarikat anak mereka memiliki 51% modal berbayar Malaysian French Bank Bhd ('MFB'). Pada 6 Julai 1984, satu perjanjian telah dimeterai di antara perayu dan pembeli di mana mereka bersetuju untuk melakukan pertukaran bagi pelaburan mereka masing-masing di dalam UMBC dan MFB. Saham-saham yang menjadi perkara asasi pertukaran adalah saham syarikat-syarikat yang memiliki tanah. Fasal 3 perjanjian menjadikan satu syarat bahawa kelulusan semua pihak berkuasa yang berkaitan, termasuk dari Bank Negara dan Jawatankuasa Pelaburan Asing ('FIC'), hendaklah diperolehi. Pada 3 Oktober 1984, FIC memberikan kelulusan "tertakluk kepada kelulusan Bank Negara Malaysia diperolehi" dan pada 8 November 1984 Bank Negara telah meluluskan transaksi. Perjanjian telah disempurnakan pada 4 Disember 1984.

Pada bulan Jun 1991, responden menyerahkan kepada perayu notis taksiran mengkehendaki perayu membayar RM15,147,847.10 sebagai cukai pemindahan saham di bawah Akta Cukai Pemindahan Saham (Syarikat Berasaskan Tanah) 1984 ('Akta'). Akta bagaimanapun sudah tidak lagi wujud. Akta dijadikan undang-undang pada 31 Disember 1984 tetapi berkuatkuasa pada 19 Oktober 1984 melalui peruntukan anggapan. Oleh itu Akta tidak wujud pada tarikh perjanjian berkenaan. Seksyen 5 Akta memperuntukkan bahawa di mana pelupusan atau pengambilan sesuatu aset boleh cukai memerlukan kelulusan oleh badan kerajaan atau jawatankuasanya, tarikh pelupusan adalah pada tarikh kelulusan diberikan. Responden mendakwa bahawa Akta terpakai kepada perjanjian di sini disebabkan oleh s. 5, mengambilkira bahawa perjanjian adalah tertakluk kepada kelulusan Bank Negara dan FIC, serta fakta bahawa Bank Negara hanya memberikan kelulusannya pada 18 November 1984, iaitu selepas 19 Oktober 1984 – tarikh berkesan yang dianggap Akta. Hujah responden disahkan oleh kedua-dua Pesuruhjaya Khas dan Mahkamah Tinggi pada rayuan pertama. Perayu merayu seterusnya.

Diputuskan (keputusan majoriti, membenarkan rayuan)
Oleh Gopal Sri Ram, HMR

(1) Proviso kepada s. 5 tidak menunjukkan dengan jelas sama ada ia merujuk kepada suatu kehendak yang ditetapkan oleh undang-undang atau kehendak suatu terma di dalam perjanjian pelupusan. Atas kekaburannya itu, ia seharusnya ditafsirkan secara yang memanfaatkan pembayar cukai. Kehendak yang diperkatakan oleh provisio adalah merujuk kepada kehendak yang ditetapkan oleh undang-undang. Oleh itu, menjadi kewajipan jabatan hasil untuk menunjuk kepada undang-undang bertulis yang memerlukan perjanjian seperti perjanjian di sini diluluskan oleh Kerajaan. Panduan FIC bukan merupakan undang-undang.

(2) Jika Akta terpakai kepada perayu, ianya bererti bahawa perayu harus memfailkan taksiran cukainya dalam masa sebulan dari tarikh ia menerima kelulusan Bank Negara, iaitu sebelum 7 Disember 1984. Ini suatu kemustahilan, oleh kerana Akta tidak diluluskan oleh Parlimen sehinggalah 31 Disember 1984. Perayu, walaupun begitu, telah memungkiri peruntukan Akta

yang menganjurkan hukuman kesiksaan. Akibat tersebut jelas tidak adil. Sudah menjadi prinsip yang terpakai lama bahawa Parlimen dianggap tidak meniatkan sebarang akibat yang tidak adil. Akibat tidak adil sedemikian tidak mungkin diniatkan oleh Parlimen.

(3) Akta harus dibaca secara berharmoni dengan cabang pertama fasal 7(1) Perlembagaan Persekutuan yang menyentuhi undang-undang kesiksaan retrospektif. Pendekatan ini adalah sejajar dengan anggapan bahawa Parlimen tidak meniatkan Akta-Aktanya melanggar Perlembagaan. Terdapat anggapan yang kukuh terhadap keperlembagaan statut. Oleh itu, sesuatu statut hendaklah dibaca secara yang berharmoni dengan Perlembagaan bagi mengelakkan sebarang konflik di antara mereka yang akan menjadikan statut itu tak sah. Akta, dengan itu, hendaklah dibaca secara prospektif demi mengelakkan perayu dan mereka-mereka yang senasib dengannya menjadi bertanggungan secara jenayah secara retrospektif.

(4) Adalah jelas bahawa suatu statut cukai yang terlalu retrospektif boleh dibatalkan kerana melanggar hak asasi seseorang. Sama ada sesuatu statut cukai itu terlalu retrospektif bergantung kepada fakta dan halkeadaan sesuatu kes.

Oleh Abdul Aziz Mohamad HMR:

(1) Kelulusan FIC bukanlah satu kelulusan bersyarat. Kelulusan bersyarat adalah kelulusan yang tertakluk kepada syarat-syarat. FIC tidak meletakkan sebarang syarat atas kelulusannya, yang mana, jika syarat tersebut tidak dipatuhi, akan menjadikan kelulusannya itu tidak berkesan.

(2) Kehendak yang diniatkan oleh Parlimen di proviso s. 5 bukanlah kehendak yang dimasukkan oleh pihak-pihak ke dalam perjanjian mereka. Kehendak yang diniatkan mestilah kehendak undang-undang atau sesuatu yang mempunyai kuatkuasa undang-undang. Namun, tiada kehendak sedemikian wujud di sini. Oleh itu, pelupusan kes ini tidak memerlukan kelulusan "Kerajaan atau pihak berkuasa atau jawatankuasa yang dilantik oleh Kerajaan".

Oleh Arifin Zakaria HMR (menentang):

(1) Perjanjian tidak lebih dari satu perjanjian bersyarat. Suatu berjanjian bersyarat tidak boleh dikuatkuasakan sehinggalah syarat duluannya dipatuhi. Oleh kerana kelulusan yang diberikan oleh FIC tertakluk kepada kelulusan Bank Negara, maka, selagi kelulusan Bank Negara tersebut tidak diperolehi, selagi itulah syarat tidak dipatuhi sekaligus menjadikan perjanjian tidak boleh dikuatkuasakan.

(2) Proviso kepada s. 5 cukup luas bagi merangkumi kedua-dua situasi, tanpa mengira sama ada kehendak merupakan kehendak di bawah undang-undang ataupun di bawah perjanjian.

(3) Tarikh pelupusan di sini dengan itu adalah sewaktu syarat terakhir dipenuhi, iaitu pada tarikh kelulusan Bank Negara pada 8 November 1984. Pelupusan dengan itu adalah termasuk ke dalam rangka peruntukan Akta sepenuhnya.

(4) Peruntukan kesiksaan yang ada di dalam Akta tidak menyebabkan ketidakadilan kepada perayu dan pembeli, kerana s. 46(1) Akta memperuntukkan bahawa kegagalan menyerahkan borang cukai akan hanya menjadi kesalahan sekiranya pembayar cukai gagal memberikan sebab munasabah atas kegagalannya. Apa itu alasan munasabah bergantung kepada fakta dan keadaan kes dan ia cukup luas untuk merangkumi fakta-fakta khusus kes di sini.

(5) Undang-undang cukai tidak boleh dibatalkan atas alasan ketidakmunasabahan cuma kerana ianya beroperasi secara retrospektif. Akta tidak boleh dikatakan tidak munasabah atau keterlaluan pada sifat atau kesannya atau telah menjejaskan walaupun sedikit hak asasi perayu seperti yang dijamin oleh Perlembagaan.

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1960] 26 MLJ 47 ***(refd)***

Chin Choy & Ors v. Collector of Stamp Duties [1979] 1 MLJ 69 ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

Citibank NA v. Jong Tze Khiok & Anor [1993] 4 CLJ 325 SC ***(refd)***

Director-General of Inland Revenue v. LTS [1974] 1 MLJ 187 ***(refd)***

Ho Kok Cheong Sdn Bhd & Anor v. Lim Kay Tiong & Ors [1979] 2 MLJ 224 ***(refd)***

Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd [2003] 3 CLJ 201 CA ***(refd)***

Inland Revenue Commissioners v. Hinchy [1960] AC 748 ***(refd)***
Janis Wijesuria v. HR Amit [1966] AC 374 ***(refd)***
Jawaharmal v. State of Rajasthan AIR [1966] SC 764 ***(refd)***
JK Cotton Spinning and Weaving Mills Ltd v. Union of India AIR [1988] SC 191 ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Multi-Purpose Holdings Bhd [2001] 8 CLJ 462 HC ***(refd)***
Kwong Borneo Development Co Sdn Bhd v. DGIR (Tax Appeal No. 01-1989) (unreported) ***(refd)***
Malwa BS v. State of Punjab AIR [1983] SC 634 ***(refd)***
Marathaei v. Syarikat JG Containers (M) Sdn Bhd [2003] 2 CLJ 96 CA ***(refd)***
Margin v. Inland Revenue Commissioner [1971] AC 739 ***(refd)***
National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***
National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***
Nazeera Motor Service v. State of UP AIR [1970] SC 1124 ***(refd)***
Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***
Partington v. A-G UK [1869] 21 LTR 370 ***(refd)***
Rai Ramkrishna v. State of Bihar AIR [1963] SC 1667 ***(refd)***
Usra Tampi (M) Sdn Bhd v. MBf Property Trust Management Bhd [2003] 3 CLJ 156 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 33
Federal Constitution, art. 7(1)
Finance Act 1986, s. 29
Finance Act 1988, ss. 3, 26(a)
Finance (No 2) Act 1985, s. 46
Share (Land Based Company) Transfer Tax Act 1984, ss. 1, 2, 3, 4, 5, 9, 11(2), 15, 18, 33, 46(1)

Central Excise Rules 1944 [India], rr. 9, 49
Finance Act 1982 [India], ss. 11A(1), 51

For the appellant - Anand Raj (Irene Yong with him); M/s Shearn Delamore & Co
For the respondent - Norhisham Ahmad

[Appeal from High Court, Kuala Lumpur; No: R-3-14-1-97]

Reported by Amutha Suppayah

JUDGMENT

Gopal Sri Ram JCA:

Background

[1] The appellant is a private limited company. It had two wholly owned subsidiaries. One was Dominion Holdings Sdn Bhd ("Dominion"). The other was Goodrich General Industries Sdn Bhd ("Goodrich"). Dominion and Goodrich together owned 40.68% of the issued and paid-up capital of United Malayan Banking Corporation Berhad ("UMBC"). They also owned RM12,202,996 loan stock in UMBC.

[2] On 6 July 1984, an agreement was entered into between the appellant and two companies, Daan Sdn Bhd and Dani Sdn Bhd whom I will collectively refer to as "the purchasers". The purchasers owned the entire issued and paid-up capital of Aslira Sdn Bhd ("Aslira"). Aslira owned 51% of the issued and paid-up capital of Malaysian French Bank Bhd ("MFB"). By this agreement, the parties agreed to exchange with each other their respective investments in UMBC and MFB. It is important to mention that the shares that formed the subject matter of exchange were of companies that owned land.

[3] Clause 3 of the agreement made it conditional upon obtaining the approval of "all relevant and appropriate Governmental and regulatory authorities of the Malaysian Government". That clause also required the consent of Bank Negara and, if necessary, the Foreign Investment Committee for the deletion of one of the articles of MFB's articles of association.

[4] On 9 July 1984 the appellant applied to the Foreign Investment Committee ("the FIC") and Bank Negara Malaysia their approval. On 3 October 1984 the FIC replied saying that it had no objections subject to the transaction being approved by Bank Negara. By a letter dated 8 November 1984 Bank Negara approved the transaction. Completion of the agreement took place on 4 December 1984. In June 1991 the appellant received a rude shock. The respondent served the appellant a notice of assessment dated 29 June 1991 essentially requiring the appellant to pay RM15,147,847.10 as share transfer tax under the Share (Land Based Company) Transfer Tax Act 1984 ("the Act"). The Act no longer exists. So the problem that is now before us may not recur. But the case is nevertheless important from the standpoint of the parties to this appeal.

The Act

[5] Now, I must say something about the background to the Act. In the early 1970's the price of land in this country sky-rocketed. Something had to be done to bring land prices under control. So Parliament enacted the Land Speculation Tax Act 1972. Any sale of land attracted a tax of 50% of the profit made by the vendor. That was quite harsh and the 1972 Act proved unpopular. So, in 1976 it was replaced with the Real Property Gains Tax Act. The 1976 Act only applied to gains made in respect of transactions involving the sale or exchange of land. It had no application to a sale or exchange of shares. Conveyancing solicitors and their clients took advantage of this loophole in the law. A company that was a shell was found or formed. Land would then be transferred to that company in return for shares. All those shares would then be sold to a purchaser who got the land which was the sole asset of the company. Mere ad valorem was paid as stamp duty on the share transfer forms. The Government lost millions in revenue. It was to close the loophole and to attract revenue that the Act was passed.

[6] The Act was enacted on 31 December 1984. But it came into force on 19 October 1984 through a deeming provision. Section 3 of the Act, which is the charging provision created a tax called share transfer tax which is attracted by a disposal of a chargeable asset. The Act defines what a chargeable asset means. For present purposes the important provision is s. 5. It underwent subsequent changes. But at the material time it said this:

> A disposal of chargeable asset shall be deemed to take place:
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> (a) where there is an agreement in writing or otherwise for the disposal of the chargeable asset, on the date of such agreement; or
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> (b) where there is no agreement, on the date of delivery of the chargeable asset to the acquirer:
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> Provided that where in either case the disposal or acquisition of such chargeable asset requires the approval by the Government or an authority or committee appointed by the Government, the date of disposal shall be the date of such approval or where such approval is conditional, the date when the conditional or last of the conditions is satisfied.

[7] It is revenue's case that the Act applies to the agreement in this case because of s. 5. The appellant disputes that. Revenue's argument was upheld by both the Special Commissioners and the High Court on first appeal. It is the correctness of those decisions, on a point of pure law, that is being tested before us. And it is that issue I now turn to address.

Does The Act Apply?

[8] Now, it is beyond question that as a matter of pure fact the Act did not exist on the date of the agreement in question. If on 6 July 1984, so soon after the ink on the document had dried, the appellant and revenue had opened the statute book, they would not have been able to find the Act. It was enacted on 31 December 1984 and only came onto the books on 1 January 1985. But s. 1 said that the Act was deemed to have come into force on 19 October 1984. That is also a date after 6 July 1984. Section 5 also does not help revenue because there is a written agreement in this case and in accordance with the terms of that section, the disposal in this case took place on 6 July 1984: again before the deemed coming into force of the Act.

[9] But revenue says that the proviso to s. 5 is a complete answer to the appellant's case. The agreement here says that it is conditional upon the obtaining of the FIC's approval. So the proviso applies to this agreement. Because, this is an agreement which – to quote the words of the proviso – "requires the approval by the Government or an authority or committee appointed by the Government". And that is because the agreement says so. Revenue goes on to argue that the FIC gave its approval on 3 October 1984 making it subject to Bank Negara's approval. And Bank Negara gave its approval on 8 November 1984, which is after 19 October 1984 – the deemed effective date of the Act. It is by this process of deduction that revenue says that the Act applies to the transaction in this case.

[10] With respect, I am unable to agree. In my judgment, the proviso does not assist revenue for several reasons.

[11] In the first place, the crucial words in the proviso are, as pointed out to counsel during argument by my learned brother Abdul Aziz JCA, that the disposal "requires the approval by the Government, etc". The proviso does not, in my judgment, make it clear whether it refers to a requirement imposed by law or a requirement of the term of the agreement of disposal. It is

therefore ambiguous and must be construed in favour of the appellant as taxpayer. See *Ketua Pengarah Hasil Dalam Negeri v. Multi-Purpose Holdings Bhd* [2001] 8 CLJ 462, per KC Vohrah J; *Director-General of Inland Revenue v. LTS* [1974] 1 MLJ 187, per Chang Min Tat J; *Chin Choy & Ors v. Collector of Stamp Duties* [1979] 1 MLJ 69 at p 70, per Chang Min Tat FJ; *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339.

[12] I would also in this context refer to what Lord Donovan said in *Mangin v. Inland Revenue Commissioner* [1971] AC 739 about the approach to the interpretation of a provision in a taxing statute:

> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J said in his (*albeit* dissenting) judgment in *Marx v. Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.
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> Secondly, '... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'. (Per Rowlatt in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v. Regeim* [1945] 2 All ER 499, [1946] AC 119).
>
> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

[13] Adopting the approach that commends itself, I am of opinion that the requirement of which the proviso speaks refers to a requirement imposed by law. So, it is incumbent on revenue to point to a written law which requires an agreement such as the one in the present instance to have the approval of Government or an authority or committee appointed by the Government. Counsel for revenue frankly and correctly conceded that there is no such law. There was a faint suggestion by counsel for revenue

A that the FIC Guidelines applied to this case. But, as my learned brother Arifin Zakaria JCA pointed out in response, the FIC Guidelines are not law. See, *Ho Kok Cheong Sdn Bhd & Anor v. Lim Kay Tiong & Ors* [1979] 2 MLJ 224, where Wan Hamzah J said: "The guidelines were issued not pursuant to any power given B by law, and in my opinion they have no force of law …".

[14] I now come to my second reason. Assume for a moment that revenue is correct in saying that the Act applies to the appellant. What does that mean for the appellant? It means that C it would have had to comply with several provisions of the Act. For example, it would have had, in accordance with s. 9, filed its tax return within one month of the date on which it received Bank Negara's approval, that is to say, not later than 7 December 1984. But that would be a physical impossibility D because the Act was not passed by Parliament until 31 December 1984. Yet, the appellant would have breached a provision of the Act that attracts penal consequences. Also, the purchasers, as acquirers within the Act, would be unable to comply with their obligations under Act, thereby becoming liable to pay the tax by E virtue of s. 15 of the Act. The consequences are practically unjust.

[15] But it is a well established principle that Parliament is presumed not to intend an unfair or unjust result. In *Marathaei v. Syarikat JG Containers (M) Sdn Bhd* [2003] 2 CLJ 96, when F delivering the judgment of this court I said that:

> [T]he primary approach of a court to all written law is to act upon the presumption that Parliament does not intend an unfair or unjust result, that is to say, that it accords with the rule of G law in art 8(1). This is a presumption of ancient repute that finds its origins in the context of retrospective legislation. But it is of wider amplitude and of general application. Raja Azlan Shah J (as he then was) referred to it in *Pesuruhjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors* [1971] 2 MLJ 30 at p 31. Lord Mustill reaffirmed it in *'The Boucraa'* [1994] 1 All ER 20 at pp. 29-30. It H is a strong presumption. But it is rebuttable.

[16] Applying that principle to the present case, it is my judgment that Parliament could not have intended such an unjust result as that which would ensue if the Act is read in the way counsel for I revenue wants it read.

[17] There is a third reason for reading the Act prospectively. In my judgment the Act must be read harmoniously with the first limb of art. 7(1) of the Federal Constitution which strikes at retrospective penal laws. That article reads:

> 7. (1) No person shall be punished for an act or omission which was not punishable by law when it was done or a made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

[18] This approach is in keeping with the presumption that Parliament does not intend its Acts to violate the Constitution. In other words, there is a strong presumption in favour of the constitutionality of a statute. Hence, a statute must be read harmoniously with the Constitution to avoid any conflict between them which will result in the statute becoming void. Adopting that approach, the Act must, in my judgment be read prospectively to prevent the appellant and those similarly circumstanced from becoming retrospectively criminally liable.

[19] For, it is well settled that an excessively retrospective taxing statute may be struck down as violative of a citizen's fundamental rights. Whether a particular taxing statute is excessively retrospective depends on the facts and circumstances of each case.

[20] Thus, in *J.K. Cotton Spinning and Weaving Mills Ltd. v. Union of India* AIR [1988] SC 191, Dutt J said:

> It is not disputed that the Legislature is competent to make laws both prospectively and retrospectively. But, as pointed out by this Court in *Jawaharmal v. State of Rajasthan* AIR [1966] SC 764, cases may conceivably occur where the Court may have to consider the question as to whether excessive retrospective operation prescribed by a taxing statute amounts to the contravention of the citizens' fundamental rights; and in dealing with such a question the Court may have to take into account all the relevant and surrounding facts and circumstances in relation to the taxation. Again in *Rai Ramkrishna v. State of Bihar* AIR [1963] SC 1667 this Court has pointed out that if the retrospective feature of a law is arbitrary and burdensome, the statute will not be sustained and the reasonableness of each retrospective statute will depend on the circumstances of each case; and the test of the length of time covered by the retrospective operation cannot, by itself, necessarily be a decisive test.

[21] As I have already said, it is to avoid an infringement of the appellant's fundamental rights that the Act must be read prospectively.

Conclusion

[22] Before concluding, I would make some observations which are relevant to this case. There is no doubt that this case is, at the end of the day, one that involves statutory construction. It is an area that academics are highly critical of because there are simply no governing rules that can be set down on paper. Some speak of the existence of a "Golden Rule" in the field of statutory interpretation. But if you look carefully enough the only golden rule is that there are no rules governing statutory interpretation. As Pearce & Geddes in the 5th edition of their text *"Statutory Interpretation In Australia"* point out, there are merely approaches and assumptions to interpretation. These are principles. But by no means are they rules. The learned authors go on to say as follows:

> To elevate them (that is, the approaches and assumptions) to the level of 'rules' is but to mislead as it invites the conclusion that courts and tribunals will strictly apply them. If one could be sure that every writer of legislation knew all the approaches and assumptions of the courts and rigidly adhered to them – if indeed that were possible – it would be permissible to talk in terms of rules. But this is not the case and **the so-called rules can only be regarded as aids to interpretation.** And very helpful aids they are; but it must not be forgotten that the task before the courts is to ascertain the meaning of the legislation. The failure to apply a well-established presumption does not matter if the correct meaning is arrived at. (emphasis added.)

[23] So, the task of the court is to ascertain the correct meaning and purport of a statute. So long as it achieves that task, it does not matter what route it adopts to arrive at its destination. That is what I have tried to do here.

[24] For the reasons already given, I would allow the appeal and set aside the orders of the High Court and that of the special commissioners. The assessment raised against the appellant is hereby discharged. The appellant shall have its costs here and in the court below. Deposit to be refunded to the appellant.

Abdul Aziz Mohamad JCA:

[25] The appeal before us questions the appellants' liability to share transfer tax in the sum of RM15,147,847.10 charged on 29 June 1991, to the appellants by the respondent under the Share (Land Based Company) Transfer Tax Act 1984 ("the Act"). The Special Commissioners and the High Court have dismissed the appellants' appeals to them.

[26] The appellants owned 6,500,000 shares in Dominion Holdings Sdn Bhd ("DH") and 6,500,000 shares in Goodrich General Industries Sdn Bhd ("GG"). DH and GG, which were the appellants' wholly-owned subsidiaries, collectively owned 24,405,999 ordinary shares representing 40.68% of the issued and paid-up capital of United Malayan Banking Corporation Bhd ("UMBC") and also RM12,202,796 loan stock in UMBC. This means that those investments in UMBC were owned by the appellants through DH and GG.

[27] On 6 July 1984, before the Act came into existence, the appellants entered into an agreement ("the agreement") for the sale of their entire DH and GG shares to Daan Sendirian Berhad ("Daan") and Dani Sendirian Berhad ("Dani"), (collectively "DD"). DD owned the entire issued and paid-up capital of Aslira Sdn Bhd ("Aslira") (1,000,002 shares) and Aslira owned 51% of the issued and paid-up capital of Malaysian French Bank Bhd ("MFB"). This means that DD owned the 51% stake in MFB through Aslira.

[28] The total consideration for the DD and GG shares was to be satisfied by DD by the transfer of the 1,000,002 Aslira shares to the appellants and, in addition, the payment to the appellants of the sum of RM132,202,996. The result would be that the appellants' investments in UMBC would become the investments of DD, and the investments of DD in MFB would become the appellants'. It was an exchange between the appellants and DD of their respective investments in UMBC and MFB.

[29] Clause 3(I) of the agreement provided as follows:

> This Agreement is conditional upon:
>
> (a) the disposal of the DH and GG shares being approved by the members of MPHB" – that is the appellants – "in general meeting if necessary;

A (b) approval of this Agreement being obtained from all relevant and appropriate Governmental and regulatory authorities of the Malaysian Government (hereinafter called "the Authorities") and in particular and specifically the approvals from the Authorities to the effect that:

B (i) for all intent *(sic)* and purposes, MFB shall be deemed to have fulfilled the requirements of the New Economic Policy with respect to capital participation and that MPHB shall at all times be allowed to hold not less than fifty-one percent (51%) of the equity of MFB,

C (ii) that the "Approved Bank" status currently enjoyed by MFB shall not be affected by the change of shareholders of Aslira;

(c) the consent of Bank Negara and if necessary the Foreign
D Investment Committee to the deletion of Articles *(sic)* 33A of the Articles of Association of MFB and following such consent the passing of a special resolution by a general meeting of MFB to delete the same;

[30] On July 9, 1984, the appellants wrote to the Foreign
E Investment Committee ("FIC"). They explained the effect of the agreement in the following words:

> Under the said Agreement, Daan Sdn. Bhd. ("Daan") and Dani Sdn. Bhd. ("Dani") will purchase the entire issued and paid-up
F capital in Goodrich General Industries Sdn. Bhd. ("GG") and Dominion Holdings Sdn. Bhd. ("DD")" – should be DH – "from our Company while our Company will purchase the entire issued and paid-up capital in Aslira Sdn. Bhd. ("Aslira") from Daan and Dani.

G The appellants there distinguished between DD's purchase of GG and DH, on the one hand, and the appellants' purchase of Aslira, on the other.

[31] After explaining the consideration for the transaction and the
H involvement of MFB and UMBC, the appellants said:

> The proposed exchanges will in fact, further enhance Bumiputra interest in the banking sector as it increases the Bumiputra equity interest in UMBC from 40.68% to 91.36%. UMBC is the third largest domestic commercial bank in the country as compared to
I MFB which is a new domestic bank with only 2 existing branches. We therefore, seek your approval for the following:

i) approval for our Company to purchase Aslira. A

ii) confirmation that MFB shall be deemed to have fulfilled the requirements of the New Economic Policy with regard to capital participation and that our Company, through Aslira shall at all times be allowed to hold not less than 51% of the capital of MFB. B

iii) approval for MFB to delete Article 33A of the Articles of Association which states "No transfer of shares will be permitted which will result in the aggregate share-holdings of Bumiputras falling below 30% of the Company's issued share for the time being. C

[32] It will be noticed from request (i) that the appellants did not seek approval for DD's purchase of DH and GG (being, conversely, the sale of DH and GG to DD). Request (ii) sought confirmation of the matters in para. (b)(i) of cl. 3.(I) of the D agreement. Request (iii) was pursuant to para. (c) of the clause. The appellants were obviously concerned to ensure that their purchase of the Aslira shares, through which they would have a stake in MFB, would be safe as not being in contravention of the New Economic Policy. E

[33] Also on 9 July 1984, the appellants wrote to Bank Negara Malaysia ("BNM"). What they sought from BNM were virtually the matters sought from the FIC, with the addition of the confirmation of the "Approved Bank" status mentioned in para. (b)(ii) of cl. 3.(I) of the agreement. F

[34] It is to be noted that the conditions in para. (b) of cl. 3.(I) of the agreement were of two kinds, the general condition and the specifics in subparagraphs (i) and (ii). The words of the general condition were "approval of this agreement being obtained from all G relevant and appropriate Governmental and regulatory authorities of the Malaysian Government". Of that paragraph, para. (b), what the appellants sought from the FIC and BNM were the specifics. The appellants did not seek "approval of this agreement". Approval of their purchase of Aslira that they sought was not H "approval of this agreement". As to the specifics in subparas (i) and (ii), although in relation to them the word "approvals" was used in para. (b), the matters in subparagraphs (i) and (ii) were such that, logically, one could not seek approvals of them. One could only seek confirmation or assurance of them. Therefore, in I effect, as far as approvals are concerned, the only condition of para. (b) was "approval of this agreement", which, as I said, the appellants did not seek.

[35] On 3 October 1984, the FIC replied to the appellants. The essential reply was in para. 4 of the FIC's letter:

> This is to inform you that the FIC has no objection to the acquisition by Daan and Dani of 40.7% interest in UMBC held by Goodrich and Dominion and the acquisition by MPHB of 51% interest in MFB held by Aslira subject to the approval of Bank Negara Malaysia being obtained.

It is to be observed that they also approved DD's acquisition of the interest of DH and GG in UMBC which, as I said, the appellants did not seek approval of. As to requests (ii) and (iii) in the appellants' letter, the FIC advised them to address those matters to BNM, which they had already done.

[36] On 8 November 1984, BNM replied to the FIC's letter. They said:

> We write to inform you that the Government has approved the exchange of shares of United Malayan Banking Corporation and Malaysian French Bank between Multi-Purpose Holdings Berhad on the one hand and Daan Sendirian Berhad and Dani Sendirian Berhad on the other, as outlined in your letter dated July 9, 1984.

What was approved there was the exchange of the shares, which was wider than what the appellants sought. BNM also approved or confirmed the other matters that the appellants sought.

[37] On 4 December 1984, according to the Special Commissioners' findings, the exchange of shares and the making of cash payment was completed, signifying the completion of the sale and purchase.

[38] The Act received the Royal Assent on 24 December 1984, and was gazetted on 31 December 1984, after all the events that have been set out had taken place. Section 1, however, deemed it to have come into force on October 19, 1984, after the FIC's reply but before BNM's reply. (I am using the past tense in relation to the Act because the Act has been repealed, by s. 26 of the Finance Act 1988, with effect from 21 October 1988). Section 3 provided as follows:

> 3. A tax, to be called share transfer tax, shall be charged in accordance with this Act on the value of every disposal of shares in a land based company on or after the 19th October 1984 under circumstances specified in section 4.

Among the circumstances in s. 4 were that, at the time of the disposal of the shares concerned, the shares in the land-based company concerned were not listed for quotation in the official list of a stock exchange in Malaysia or elsewhere, and that the disposal of the shares concerned was by value one million ringgit or more.

[39] Since chargeability to tax depended on the date of disposal, that is on or after 19 October 1984, it was necessary for the Act to lay down provisions for determining when, for purposes of chargeability, a particular disposal took place. This was done in s. 5, which provided as follows:

> 5. A disposal of a chargeable asset shall be deemed to take place:
>
> (a) where there is an agreement in writing or otherwise for the disposal of the chargeable asset, on the date of such agreement; or
>
> (b) where there is no agreement, on the date of delivery of the chargeable asset to the acquirer;
>
> Provided that where in either case the disposal or acquisition of such chargeable asset requires the approval by the Government or an authority or committee appointed by the Government, the date of disposal shall be the date of such approval.

[40] On 9 January 1986, the Finance (No. 2) Act 1985 (Act 323) was gazetted. Its s. 46 amended the proviso to s. 5 by the addition at the end of it of the words "or, where such approval is conditional, the date when the condition or last of the conditions is satisfied". The amendment was, like the Act itself, deemed to take effect on 19 October 1984.

[41] On 29 June 1991, came the notice of assessment of share transfer tax of RM15,147,847.10. Although the Act had been repealed, s. 26(a) of the Finance Act 1988 preserved the right of the respondent under the Act to assess, or to enforce payment of, share transfer tax which at the date of the repeal, 21 October 1988, remained to be assessed or paid. It is clear from the respondent's letter dated 18 March 1991, to the appellants that the tax charged, and chargeability to tax, were only on the disposal of the GG shares, the amount being 10% of the value of the consideration for those shares received by the appellants, which was reckoned at RM151,478,471.

[42] Were the disposal of the GG shares not regarded as requiring the approval mentioned in the proviso to s. 5 of the Act, the date of disposal would have been as provided by para. (a) of the section, that is to say, the date of the agreement, 6 July 1984, which was before the chargeability date of 19 October 1984. No tax would, therefore, have been chargeable. But the respondent treated the disposal as requiring the approval mentioned in the said proviso. Even so, were it not for the amendment of the proviso by Act 323, since the respondent treated the FIC's letter of 3 October 1984, as giving the approval required by the proviso, then according to the proviso the disposal would have been on 3 October 1984, again before 19 October 1984, and therefore not taxable, despite the words "subject to the approval of Bank Negara Malaysia being obtained" in para. 4 of the FIC's letter. Thus the position was that when the Act was published on 31 December 1984, and for two years after that, the appellants, the respondent, and every tax consultant who knew the facts would have known that the disposal of the GG shares was not chargeable to share transfer tax. But two years after the Act was published, and that, too, was after the agreement had been completed, came Act A 323 to amend the proviso, also with retrospective effect to 19 October 1984. The respondents' case rested entirely on that amendment. He treated the FIC's "approval", because of the words "subject to approval of Bank Negara Malaysia being obtained", as a conditional approval and he relied on the added provision to determine that the disposal was not on the date of the FIC's approval but on the date when the condition was fulfilled, that is to say, 8 November 1984, when BNM gave their approval. The disposal was therefore, to him, after the chargeability date 19 October 1984, and liable to share transfer tax.

[43] That brings me to one of the arguments raised by the appellants under their alternative contention.They say that the FIC's approval was not a conditional approval. I agree with them. By maintaining that the FIC's approval was a conditional approval, the respondent's stand must be that the FIC were the approving authority, who, for the purposes of the amended proviso, gave an approval that was conditional because of the words "subject to approval of Bank Negara Malaysia being obtained". An approval that is conditional is an approval that is subject to conditions. There are, broadly, two types of conditions to which an approval may be subject. One type is where the approval is operative but

conditions are imposed to be observed, breach of which will either result in some form of penalty or the approval being cancelled or withdrawn. The other is where the approval is provisional, that is to say, it is subject to the fulfilment of certain conditions before it becomes operative. In my opinion the amended proviso to s. 5 was thinking of such an approval and such a condition. Such a condition would be, for example, a condition that a certain payment be made within a certain period. It must go to the essential effectiveness of the approval itself. Sometimes to carry on an activity the approvals of two or more authorities are required, let us say the police and the local authority. The police, in considering whether to give approval, will look to the rules that govern them in the area concerned. Satisfied that everything is clear within their sphere, they give the approval. There is nothing more that they need – no conditions to be fulfilled before their approval is operative. But because they are afraid that the party concerned might be under a misapprehension that their approval alone is sufficient to enable him to carry on the activity, and therefore proceeds to carry on the activity, they caution him with the words "subject to the approval of the local authority being obtained". That would not be subjecting their approval to a condition. Those are merely cautionary or advisory words. That, too, is what I think those words of the FIC meant. They were not subjecting their approval to a condition, failure to observe which would render their approval inherently ineffective. As far as they were concerned, they could give whatever they gave. But somehow they perceived that in the scheme of government administration the approval of BNM was required as well, and by those words they told the appellants so. They were not words of condition and the FIC's approval was not a conditional approval. Therefore the words added to the proviso did not apply and the disposal of the GG shares remained as having taken place on the date of the FIC's letter, that is to say, before the chargeability date, and did not attract the share transfer tax. For this reason I would allow the appeal.

[44] That is not the end of the matter. From what I have said, questions may arise, such as, who was to approve the disposal of the shares in this case? Was it the FIC? Why did the FIC think BNM's approval also was necessary? Was BNM's approval necessary? Were there two approving authorities, the FIC and BNM? These questions are not capable of being given legal

A answers to in the context of this appeal and the reason why that is so will be seen in my other reason for allowing this appeal, which I now proceed to give.

[45] The proviso to s. 5 applies only to a disposal that "requires
B the approval by the Government or an authority or committee appointed by the Government". If the disposal in this case did not require such an approval, the proviso did not apply and the date of disposal would be under paragraph (a) of s. 5, that is to say, on the date of the agreement, 6 July 1984, before the
C chargeability date, and therefore the disposal was not liable to share transfer tax.

[46] Reading the proviso, the first question that arose in my mind right from the start was, by what would I know that the disposal
D required such an approval? I must be able to decide that the disposal required such an approval. I could only judge that from the words of the requirement. Where would I find the words of the requirement? Parliament did not tell us. Parliament supposed that there was or there would be such a requirement. Whose
E requirement did Parliament envisage? The answer that immediately suggested itself was the requirement of the law or of something that has the force of law. The question was put to counsel during argument and they were given liberty to submit on it by written submission. It had not been raised before the Special
F Commissioners or the High Court. It had been overlooked. Everyone assumed that the requirement was in para. (b) of cl. 3.(I) of the agreement. But the question was a question of law, and one that was so fundamental to the appeal that it had to be considered despite the assumption and despite its not having been
G raised below. The appellants have taken up the question in their written submission as one of their arguments under their alternative contention, maintaining in effect that the requirement must be the requirement of the law. The respondent in his written submission has continued to maintain that the requirement was in
H the agreement, in para. (b) of cl. 3.(I).

[47] My opinion is that, in the proviso, Parliament could not have intended a disposal or acquisition that, by the agreement of the parties themselves, requires such an approval. Parties who wish to dispose of or acquire assets would not burden themselves with the
I requirement of any approval – and Parliament would not have contemplated parties doing that – unless they conceive that the requirement of an approval is imposed on them externally, from

beyond themselves, and they therefore provide in the agreement for the obtaining of the approval, and they do that as a safety measure, so that if the approval is not obtained, the deal is aborted. That, I believe, was the reason for cl. 3.(I). The appellants and DD conceived that there was some external requirement that imposed on them the need to obtain the approvals of the matters set out in paras. (b) and (c) of cl. 3.(I). They, particularly the appellants, wanted to make sure that the approvals that they thought had to be obtained were obtained, failing which they could cancel the deal and go their ways without incurring any liability to one another. That was what they provided in cl. 3.(II), where they said:

> (II) If any of the conditions referred to in Clause 3 (I) above shall not have been fulfilled or waived by the mutual agreement of the parties hereto in writing within three (3) months from the date hereof (hereinafter called "the Last Date") or by such later date as the parties hereto may mutually agree in writing or if the terms and conditions of any such approval and consent are not satisfactory to MPHB or DD by the Last Date then either party may by one (1) month's notice in writing terminate this Agreement and thereupon this Agreement shall become void and neither party shall make any claim against the other.

There they even contemplated the contingency of their waiving the conditions by mutual agreement, thereby highlighting the nature of the conditions as a safety measure, because they could decide to be reckless. They could waive the conditions within three months, in which event the approvals did not need to be obtained, even though they thought they were required, but the agreement would remain binding.

[48] So if at all Parliament did envisage parties imposing on themselves the requirement for approvals, it could have envisaged them doing so only on the understanding that some external requirement necessitated approvals. If such was the case, we would still have to be shown the external requirement to see its terms in order to decide whether any approval, and whose, was actually required.

[49] That Parliament did not intend the requirement in the proviso to be a requirement imposed by the parties themselves is conclusively proved by the fact that, in the proviso, Parliament spoke of a disposal or acquisition requiring the stated approval "in either case", that is to say, whether it be the case under para.

(a) of s. 5, where there would be an agreement, or whether it be a case under para. (b), where there would be no agreement. Since Parliament was also thinking of a disposal or acquisition requiring approval in the case where there would be no agreement, it could not be that the requirement intended was a requirement agreed to by the parties, since, there being no agreement, there would not be an agreed or self-imposed requirement.

[50] Finally, cl. 3.(I)(b) of the agreement cannot be taken as laying down the requirement intended by Parliament because that clause spoke of "approval of this agreement", whereas the proviso spoke of approval of the disposal or acquisition, and that clause spoke of approval of "all relevant and appropriate Governmental and regulatory authorities of the Malaysian government", whereas the proviso spoke of approval by "the Government or an authority or committee appointed by the Government". There were differences between the clause and the proviso in the number of the approving authorities and in their description.

[51] Since, in my opinion, the requirement intended by Parliament in the proviso was not a requirement self-imposed by parties in their agreement, the requirement intended must be the requirement of the law or of something having the force of law. But no such requirement has been shown to exist. I need not consider whether Parliament might have intended also an administrative requirement that is not backed by law, such as some requirement in what is generally known as the FIC Guidelines, because in any case no such requirement has been shown to exist, whether in the FIC Guidelines or elsewhere. The inevitable conclusion is that, for the purposes of the proviso to s. 5, the disposal in this case did not require approval by "the Government or an authority or committee appointed by the Government".

[52] It is interesting to note that by s. 29 of the Finance Act 1986 a new s. 5 was introduced to replace, with effect from 14 October 1986, the section that has been under consideration in this appeal. The measure was in effect a substitution of the proviso. The new proviso no longer spoke of an approval being required for a disposal or acquisition. The new s. 5 was as follows:

5(1) A disposal of a chargeable asset shall be deemed to take place:

(a) where there is an agreement in writing or otherwise for the disposal of the chargeable asset, on the date of such agreement; or

(b) where there is no agreement, on the date of delivery of the chargeable asset to the acquirer:

Provided that where the disposal of the chargeable asset by value exceeds five million ringgit and the disposal or acquisition of such chargeable asset is approved by a committee appointed by the Government the date of disposal shall be the date of such approval by the committee not-withstanding any conditions attached to the approval.

(2) For purposes of subsection (1), the reference to a committee appointed by the Government means a committee charged with the responsibility to formulate policy guidelines on foreign investment and to regulate the acquisition of assets, mergers and takeovers of companies and businesses.

The new proviso presupposed the existence of cases where the disposal or acquisition would be approved by the "committee", without indicating that, to Parliament, the approval was required. In such cases the date of approval would be the date of the disposal. The new proviso thus opened itself to the obviously arguable consequence that if there was no approval, because approval was not sought or obtained, then, where there was an agreement, the date of disposal would, according to paragraph (a) of the section, be the date of the agreement. As to what was the committee that was intended by the new proviso, the new subsection (2) explained, without naming it, that it was "a committee charged with the responsibility to formulate policy guidelines on foreign investment and to regulate the acquisition of assets, mergers and takeovers of companies and businesses". A person would not know what committee was charged with such a responsibility, not even if he were to search through all the published legal literature, were he not informed by the Explanatory Statement to the Bill for the Finance Act that it was the FIC. In the case of a Minister, one has only to consult the current Ministerial Functions Order made under the Ministerial Functions Act 1969 to know which Minister is charged with responsibility for a particular matter. The new proviso and the new subsection

A (2) show distinct signs of the draftman's difficulty in accommodating in a statute the FIC and their role under the instrument that guides their functions.

[53] Either of the reasons that I have given is sufficient for me
B to decide that this appeal should be allowed and I need not deal with each of the other grounds for the appellants' alternative contention or with each of the grounds for their principal contention. But I wish to particularly deal with two grounds of their principal contention because they can be disposed of easily
C and briefly. They are arguments advanced to avoid the operation and effect of the proviso to s. 5.

[54] I refer to paras. 79, 81, 84, 86, 87 and 88 of the appellants' written submission. My understanding of what they are saying
D there is this. They are saying that one must decide about s. 3 first before considering the effect of s. 5, in particular its proviso. To them ss. 1 and 3 established 19 October 1984, as the effective date of the Act. Looking at those sections only, to them it is not clear and unequivocal that Parliament intended the Act to apply
E to disposals under agreements entered into before that date. So according to the rules of interpretation of taxing statutes, the disposal under the agreement in this case was not subject to tax. Their stand is that it is only if the disposal came within the scope of ss. 1 and 3, by falling under an agreement entered into on or
F after 19 October 1984, that s. 5 and its proviso can be looked at to determine the date of disposal.

[55] That line of argument is to me clearly incorrect. Sections 1, 3 and 5 cannot be construed separately as suggested. They were meant to be read together. As I said at the outset, the scheme of
G the Act was that chargeability to tax was according to disposal on or after 19 October 1984, and s. 5 was intended to provide the test for determining whether a particular disposal was before or on or after that date. Section 5 was in effect a part of s. 3, being an elaboration of it. Section 3 cannot be fully understood without
H also reading s. 5. They must be read together as one. Section 5 certainly cannot be said to operate as taxing "by mere implication", as the appellants maintain in their para. 88.

[56] The other argument falls under the appellants' Argument (g)
I at p. 103 of their written submission. It stems from their stand that the words "agreement in writing" in para. (a) of s. 5 meant an agreement in writing executed on or after 19 October 1984,

and therefore did not refer to the agreement in this case, and their recognition or fear that the effect of the proviso was that, in cases where a disposal required the approval stated there, the approval date was the date of the disposal irrespective of what the date of the agreement was. So they argue that the rule about provisos is that a proviso cannot enlarge the scope of the provision that it qualifies. They refer to the following words of Jemuri Serjan, CJ (Borneo), in *Citibank NA v. Jong Tze Khiok & Anor* [1993] 4 CLJ 325:

> According to *Craies on Statute Law* (7th Ed) the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which, but for the proviso, would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect.

They also quote the following words of Edgar Joseph Jr, FCJ, in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285:

> A true proviso is something which qualifies or modifies the section to which it is a proviso. It must, therefore, be read having regard to the section itself. Generally speaking, the effect of a proviso is to take out of the section something that would otherwise fall within its ambit. This principle has been aptly put by Lush J (as he then was) in *Mullins v. Treasurer of Surrey* [1880] 5 QBD 170 at p 173 as follows:
>
> > When one finds a proviso to the section, the natural presumption is that but for the proviso the enacting part of the section would have included the subject matter of the proviso.

So they say that since it is possible to construe the proviso as referring only to approvals of disposals under agreements made after 19 October 1984, it must not be construed, as it also could, as referring to approvals irrespective of when the agreements were entered into.

[57] But the proviso in this case was not a true proviso. It was not an excepting or qualifying proviso. The purpose of s. 5 was to lay down provisions for determining the date when a disposal in any of the stated circumstances was to be taken to take place in order to determine whether the disposal would be caught by s. 3. Three circumstances were given, one in para. (a), another in para. (b), and another in the proviso. Those paragraphs and the

proviso were of equal strength and status. With a little drafting cunning, the third circumstance could have been provided for in another paragraph, para. (c), but unfortunately the draftsman chose to put it separately in a paragraph that, because of the two words "Provided that", is traditionally called a proviso. Or the draftsman could simply have said "but" instead of "Provided that" and the argument about the construction of provisos would not have arisen.

[58] Before closing, I wish to say that I have taken the trouble to set out and examine the facts in some detail, initially because the appellants have relied on them in their various grounds. Since I have not dealt with all of the appellants' grounds, some of those facts have no direct function in this judgment. I have, however, decided not to simplify the facts by omitting those functionless facts for fear that simplification would be at the sacrifice of accuracy.

[59] For the reasons that I have given, I would allow the appeal and make the orders stated by my learned brother, Gopal Sri Ram JCA.

Arifin Zakaria FCJ:

[60] The appellant is a holding company. It owned 6,500,000 shares in Dominion Holdings Sdn. Bhd ("Dominion") and a similar number of shares in Goodrich General Industries Sdn. Bhd. ("Goodrich"), which in this judgment will collectively be referred to as "the shares". These two companies are the wholly owned subsidiaries of the appellant. Together Dominion and Goodrich owned a total of 24,405,994 shares in United Malayan Banking Corporation Berhad (" UMBC"). By an agreement dated 6 July 1984 ("the agreement") between the appellant and Daan Sdn Bhd and Dani Sdn Bhd ("the purchasers") the appellant agreed to sell the shares to the purchasers for the consideration as contained in the agreement, which is to be partly satisfied by the transfer of Aslira shares. Aslira owned 51% of the issued and paid up capital of Malayan French Bank Bhd ("MFB"). The entire issued and paid up capital of Aslira were held by the purchasers. It is not in dispute that the shares on sale here were that of land based companies as defined in the Share (Land Based Company) Transfer Tax Act 1984 ("the Act").

[61] The agreement was conditional upon approval by all relevant and appropriate Governmental and regulatory authorities. This is provided in cl. 3 of the agreement which reads:

> 3(1) This Agreement is conditional upon:
>
> (a) the disposal of the DH and GG shares being approved by the members of MPHB in general meeting if necessary;
>
> (b) approval of this Agreement being obtained from all relevant and appropriate Governmental and regulatory authorities of the Malaysian Government (hereinafter called 'the Authorities') and in particular and specifically the approvals from the Authorities to the effect that:
>
> (i) for all intent and purposes, MFB shall be deemed to have fulfilled the requirements of the New Economic Policy with respect to capital participation and that MPHB shall at all times be allowed to hold not less than fifty-one per cent (51%) of the equity of MFB,
>
> (ii) that the "Approved Bank" status currently enjoyed by MFB shall not be affected by the change of shareholders of Aslira;
>
> (c) the consent of Bank Negara and if necessary the Foreign Investment Committee to the deletion of Article 33A of the Articles of Association of MFB and following such consent the passing of a special resolution by a general meeting of MFB to delete the same.

[62] Pursuant to the said clause the appellant on 9 July 1984 applied to the Foreign Investment Committee ("FIC") and Bank Negara Malaysia ("BNM") for the approval as per the condition attached to the agreement. The FIC replied by letter of 3 October 1984 stating that it has no objection to the to proposed acquisition by the purchasers of 40.7% interest in UMBC held by Goodrich and Dominion and the proposed acquisition by the appellant of 51% interest in MFB held by Alisra subject to the approval of BNM being obtained. By letter dated 8 November 1984 BNM gave their approval to the exchange of shares of UMBC and MFB between the appellant and the purchasers as outlined in the appellant's letter 9 July 1984.

[63] The exchange of shares and cash payment, signifying the completion of the sale and purchase, took place on 4 December 1984. A notice of assessment dated 29 June 1991 was issued against the appellant raising an assessment in the sum of

A RM15,147,847.10 as share transfer tax under the Act. The appellant appealed to the Special Commissioners of Income Tax by notice of appeal dated 7 November 1991. The appeal was dismissed by the Special Commissioners and the appellant appeal further to the High Court by way of case stated. The appellant B was unsuccessful in the said appeal and hence this appeal.

[64] As rightly stated by the learned judge the sole issue in contention is whether the provisions of the Act as amended by Finance Act (No. 2) Act (Act 323) which came into force on 19 C October 1984 apply to the disposal by the appellant of the shares pursuant to the agreement of 6 July 1984, at which point in time the Act had not yet been enacted.

[65] The Act, which makes provisions for the imposition, D assessment and collection of a tax on disposal of shares in a land based company, received the Royal Assent on 24 December 1984 and was published in the gazette on 31 December 1984. By s. 1 thereof it was given a retrospective effect as from 19th October 1984. Therefore, it is true to say that when the agreement was E entered into by the appellant and the purchasers on 6 July 1984 the Act was still not on the statute book. But that is no answer to the assessment sought to be raised against the appellant. The reason for my saying so will become apparent later in this judgment.

F **[66]** What is of relevant to be considered is the charging provision of the Act under which the respondent sought to raise the assessment. In the present case it is s. 3 of the Act which reads:

G > 3. A tax, to be called share transfer tax, shall be charged in accordance with this Act on the value of every disposal of shares in a land based company on or after the 19th October 1984 under circumstances specified in section 4.

[67] From my reading of the said section the tax, which is called, H the share transfer tax, is chargeable on the value of every disposal of shares in a land based company on or after 19 October 1984. The critical word here is "disposal" which is defined in s. 2 of the Act which reads:

I > 'disposal', in relation to a chargeable asset, means the sale, conveyance, transfer, exchange, assignment, settlement, delivery or alienation (including by way of an amalgamation, take over, merger or reconstruction of a company or companies), of shares:

Provided that the following shall not be regarded as a disposal: A

(a) issue of loan stock or debentures, and

(b) conversion of loan stock or debentures into shares;

[68] It is not in contention that the exchange of shares between B the appellant and the purchasers in the present case is a disposal as defined in s. 2 set out above. What is in issue is when the disposal was effected. Section 5 of the Act provides:

5. A disposal of a chargeable asset shall be deemed to take place: C

(a) where there is an agreement in writing or otherwise for the disposal of the chargeable asset, on the date of such agreement; or

(b) where there is no agreement, on the date of delivery of the chargeable asset to the acquirer: D

Provided that where in either case the disposal or acquisition of such chargeable Asset requires the approval by the Government or an authority or committee appointed by the Government, the date of disposal shall be of such approval **or, where such approval is conditional, the date when the condition or last of the conditions is satisfied.** E

(The bold words were inserted by Act 323, which was also deemed to have come into force on 19 October 1984.)

F

[69] In the present case the parties entered into a written agreement for the disposal of the chargeable asset. Therefore the disposal here is governed by s. 5(a) of the Act which provides that the date of disposal shall be the date of the agreement. However, the said provision is subject to the proviso thereof G which stipulates that if the agreement requires the approval by the Government or an authority or committee appointed by the Government, the date of disposal shall be the date of such approval or where such approval is conditional, the date when the condition or last of the conditions is satisfied. The question is H whether the Agreement in any way requires the approval of the Government etc. This is may be found in cl. 3(I)(b) and (c) of the agreement. Looking at the said clause it would appear that the agreement is subject to the approval of the Government etc. on matters specified therein agreement. In other words the approval I is a necessary precondition for the agreement to be enforceable between the parties. And it is for that reason the appellant wrote

to the FIC for the necessary approval. This was obtained on 3 October 1984, but it is conditional on further approval being obtained from BNM. This was not forthcoming until 8 November 1984, by which time the Act had already come into force.

[70] The appellant's main contention is that the Act does not apply to the disposal in the present case for two main reasons:

(a) the Agreement was entered into before the effective date of the Act;

(b) the Agreement was completed even before the Act was enacted.

[71] The learned counsel for the appellant contended that this is so because there is no transitional or savings provision extending ss. 1 and 3 of the Act to cover transactions entered into prior to the Act being enacted. He contended that there is no clear provision in the Act imposing tax on transactions entered into prior to the enactment of the Act. In this regard it must be emphasized that the charge to tax here is with respect to "disposal" of chargeable asset and not a charge on transaction or agreement, this is clear from the reading of s. 3 of the Act, which is the charging provision. As rightly observed in *Kwong Borneo Development Co. Sdn. Bhd. v. DGIR*, Tax Appeal No. 01 of 1989, High Court, Kota Kinabalu (unreported) "… s. 3 of STTA that imposed the new tax was speaking of 'disposal of shares … on or after 19 October 1984', it does not use the word agreement." That being the case it matters not when the transaction was entered into, what matters is the date of disposal. This proposition is further supported by the provisions in s. 5 of the Act which determines the date disposal in the circumstances set out therein.

[72] The issue for determination is whether the disposal in the present case falls within the ambit of the Act or not. The answer to this question turns on the construction to be given to cl. 3 of the agreement. It is clear from cl. 3(I) that the agreement is conditional upon the terms as set out in the said clause. While cl. 3(II) sets out the effect of non fulfillment of any of the conditions referred to in cl. 3(I). Clause 3(II) reads as follows:

> (II) If any of the conditions referred to in Clause 3(I) above shall not have been fulfilled or waived by the mutual agreement of the parties hereto in writing within three (3) months from the date hereof (hereinafter called "the Last Date") or by such later date as the parties hereto may mutually agree in writing or if the terms

> and conditions of any such approval and consent are not satisfactory to MPHB or DD by the Last Date then either party may by one (1) month's notice in writing terminate this Agreement and thereupon this Agreement shall become void and neither party shall make any claim against the other.

[73] It is clear that if any of the approval or consent referred to in cl. 3(I) is not obtained to the satisfaction of either party then either party may by one month notice in writing terminate the agreement and the agreement thereupon shall become void. The net effect of these provisions clearly point to the conclusion that the agreement is nothing more than a conditional agreement, which means to say that if any of the condition is not fulfilled then parties are discharged from the principal obligation under the agreement. What I mean by principal obligation here is the obligation to sell by the appellant and the obligation to purchase by the purchasers.

[74] I agree with the learned Judge that the facts of this case in one aspect is no different to that obtaining in *National Land Finance Society Ltd. v. Sharidal Sdn. Bhd.* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282. In that case the respondents had agreed to sell and the appellants had agreed to buy certain immovable property. It was a condition of the agreement that the sale should be subject to the approval of the FIC as in the present case. The FIC refused to give its approval but suggested that the property be transferred to a joint venture company where at least 30% of its equity is held by Bumiputras. The respondents contended that by reason of the non approval the agreement became void but the appellants maintained that the agreement was still subsisting and enforceable because there was a conditional approval. The learned trial judge held that the agreement was void. The appellants appealed. It was held by the Federal Court that the agreement was void because of the refusal of the FIC to approve the sale over which neither party had control and therefore the various consequential orders made by the trial judge was valid.

[75] In delivering judgment of the court Salleh Abas CJ (Malaya) (as he then was) observed as follows:

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential

stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. (see *Trans: Trust: S.P.R.L. v. Danubian Trading Co. Ltd.* – per Denning, LJ – and P*roperty and Bloodstock Ltd. v. Emerton; Bush v. Property and Bloodstock Ltd* – per Sachs, LJ. Until the FIC approval was given liability for further performance remained unenforceable, ie, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by s. 33(a) of the Contracts Act which enacts:

> 33. (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with section 33(b) of the Contracts Act, which is as follows:

> 33. (b) If the event becomes impossible, such contracts become void.

We draw much support from *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* which we think is on all fours with the case under present appeal; the only difference being that in Aberfoyle's case the parties expressly agreed that in the event of the non-fulfillment not only was the purchaser entitled to the refund of the deposit but that the agreement itself would become null and void. Whereas in the case under the present appeal the parties made no reference at all to the voidness or nullity of the agreement. This silence, in our view, is of no consequence because it is implicit that the validity or otherwise of the agreement depends entirely upon the general principle of the law of contract relating to the nature and effect of this sort of stipulation.

[76] In *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1960] 26 MLJ 47, there the appellant company agreed to sell an estate, consisting of some 1,336 acres of rubber plantations to the respondent. At the date of the agreement the appellant had good title to 1,154 acres, but its title to the other 182 acres depended on the success of its negotiations for the renewal of seven previously expired leases. Clause 4 of the agreement provided that "the purchase is conditional on the vendor obtaining … a renewal

of the seven expired leases … so as to be in a position to transfer the same to the purchaser ... and if for any cause whatsoever the vendor is unable to fulfill this condition this agreement shall become null and void and the vendor shall refund to the purchaser the deposits already made.'' The respondent duly paid the deposit but the appellant had not by agreed date fulfilled the condition stipulated in cl. 4 by obtaining a renewal of the leases. The respondent brought an action claiming refund of the deposits paid. At p. 49 their Lordships of the Privy Council observed that:

> … their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at the latest.

See also *Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd* [2003] 3 CLJ 201: *Usra Tampi (M) Sdn Bhd v. Mbf Property Trust Management Bhd* [2003] 3 CLJ 156.

[77] From the above authorities it may thus be said that a conditional contract is not enforceable until the condition precedent has been fulfilled. This is provided in s. 33 of the Contracts Act which reads:

> 33. Enforcement of contracts contingent on an event happening.
>
> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.

[78] Reverting to the instant case, since the approval given by FIC was subject to the approval of BNM, until such approval was obtained from BNM the condition would remain unfulfilled and thus the agreement could not in the circumstances be enforced. The approval by BNM only came on 8 November 1984. However, it was further contended for the appellant that BNM is not the "Government or an authority or committee appointed by the Government" as envisaged by the proviso to s. 5 therefore the effective date of approval is the date of approval given by FIC

A that is 3 October 1984. However, I don't think it is in issue whether BNM is a Government authority or otherwise because the requirement for the approval of BNM was a condition imposed by FIC. Therefore, the approval by the BNM is effectively the approval of the FIC itself.

B

[79] The next pertinent issue raised in this appeal is that the proviso to s. 5 is ambiguous in that it fails to state in clear terms whether the requirement for approval is a requirement in law or a requirement under the agreement, and it is a principle of C construction of tax legislation that any ambiguity ought to be construed in favour of the tax payer. With respect I do not find any ambiguity in the said proviso. To me the proviso is plain and clear in that where the agreement for the disposal of any chargeable asset contains the requirement of approval by the D Government etc the date of approval by the Government etc shall be deemed to be the date of disposal. As observed by Lord Reid in *Inland Revenue Commissioners v. Hinchy* [1960] AC 748, at p. 767:

> E But we can only take the intention of Parliament from the words which they have used in the Act, and therefore the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament.

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In *Partington v. A-G UK* [1869] 21 LTR 370 at p. 375 Lord Cairns stated to similar effect:

> …I do so both upon form and also upon substance. I am not at all sure that, in a case of this kind – a fiscal case – form is not G amply sufficient, because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot being the subject within the letter of the law, the subject is free, however H apparently within the spirit of the law, the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute …

I

[80] The proviso in the instant case does not draw a distinction between the two types of requirements referred to by learned counsel for the appellant, thus it is not open to us to make such a distinction. I would venture to say that even if such a distinction be drawn as suggested by counsel, I hold that the proviso is broad enough to encompass both situations, irrespective of whether the requirement was a requirement under the law or one under the agreement. And I would add that even applying the purposive approach as propounded by the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn. Bhd.* [2004] 2 CLJ 265, it would not assist the appellant's case. The reason being, going by the letter of the proviso it is clear that it was intended to cover situation where the agreement is for any reason subject to the approval of the Government etc. before the disposal can take effect. The underlying reason is obvious, because the agreement being conditional, it is not immediately enforceable until all the contingent conditions are satisfied, therefore, the disposal of the chargeable asset could only occur after the approval from the Government etc has been obtained. And since the charge to tax under s. 3 of the Act is a charge on disposal of the chargeable asset therefore it logically follows that the charge should only take effect upon the disposal of such asset. The proviso merely seeks to put beyond doubt that in such circumstances the date of disposal shall be the date of approval by the Government etc and the amendment by Act 323 seeks to make it clear that where the approval is subject to any condition then the date of disposal shall be the date when the condition or the last of the condition is satisfied. In the circumstances of the present case that will be the 8 November 1984, the date of approval given by BNM which is after the date of the deemed coming into force of Act. Therefore the disposal falls squarely within provisions of the Act.

[81] The next point raised in the present appeal is with regard to the collection provision and the penal provision found in the Act which, it is alleged could lead to injustice to the appellant and the purchasers. For instant under s. 9 both the disposer and the acquirer are required to file a return within one from the date the disposal of the shares. In the circumstances in the present case this is impossible to be complied with because if we were to take 8 November 1984 as the date of disposal then the one month period would expire on 7 December 1984. On that date the Act was yet to be passed by the legislature. And under s. 46(1) failure

to submit the requisite return would render the disposer and the acquirer liable to penal consequences. It is contended that the Parliament could not have intended such an injustice and for that reason it was contended that the Act is not intended to apply the disposal in the present case which had taken place prior to the passing of the Act by Parliament. The answer to that may be found in s. 46(1) itself which reads:

> 46.(1) Any person who makes default in furnishing a return in accordance with subsection (2) of section 9 shall, if he does so without reasonable excuse, be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term of not exceeding twelve months or to both.

[82] It may be observed that under the said section default in furnishing the return is only an offence if the tax payer failed to provide any reasonable excuse for failing to do so. What is reasonable excuse is an open question, which will of course depend on the facts and circumstances of each case. In my judgment it is certainly broad enough to cover the special facts obtaining in this case. Therefore the apprehension expressed by the learned counsel for the appellant is in the circumstances misconceived. The case of *Janis Wijesuria v. H.R. Amit* [1966] AC 374 which was cited to us by the learned counsel for the appellant in my view would not support the appellant's case. This becomes apparent on examination of the facts in that case, which are as follows:

> The appellant was the registered owner, for the period from September to December, 1959, of a motor vehicle propelled by diesel fuel. There was in force at that tune an enactment (hereinafter referred to as "the original ordinance") called the Heavy Oil Motor Vehicles Taxation Ordinance, first passed in 1935, by which a tax was imposed on heavy oil motor vehicles. These vehicles were, by the definition in force in 1959, those which used or were adapted to use crude petroleum, liquid fuel, gas oil "or any other oil not subject to import only." Since diesel oil had been subject to import duty since July 13, 1956, the appellant was not, during the stated period, liable to the heavy motor oil vehicle tax. On April 25, 1961, there was passed an Act to amend the original ordinance (hereinafter referred to as "the amending ordinance"). This Act substituted, in the definition appearing in the original ordinance, for the words "or any other oil not subject to import duty" the words "or diesel oil" so

creating a liability for tax on vehicles such as the appellant's. By section 2(2) of the amending ordinance it was provided that this amendment "shall be deemed to have come into effect on July 13, 1956."

The present appeal was concerned with the liability of the appellant to this tax in respect of the period from September to December, 1959. On May 11, 1962, a notice was sent to the appellant, under section 4(2) of the original ordinance, requiring him to pay the sum of Rs 472, in respect of tax on the vehicle, within seven days and warning him that in default he would be liable to punishment under section 5 of the ordinance. The appellant did not pay the tax …

[83] The Privy Council having considered the collection and enforcements sections expressed their views in the following words:

Their Lordship would not be disposed to place undue emphasis on minor difficulties of administration, and they recognise the retrospective legislation is likely, in its nature, to give rise to some anomalies and maladjustments. But they are forced to the conclusion in this case that it is not possible to apply the recovery or enforcement provisions of the original ordinance to the case of tax in respect of the past period without modifications and violence to the scheme of that ordinance greater than it is legitimate, by a process of construction, to make. In other words, in order to enable tax to be collected it was not sufficient merely to date back the operation of the amendment, it was necessary expressly to adapt the existing scheme to the new conditions created by the amendment by specifying the date on which the past tax was to be due, who was to pay it, within what time and at what place, and stating clearly what consequences to what person would follow if payment was not made. In the absence of provisions of this kind, their Lordships cannot arrive at the conclusion that tax for the period July 13, 1956 – April 25, 1961, can be levied under the provisions of the original ordinance or that the enforcement provisions of the original ordinance were properly operated against the appellant.

[84] In our case, I find there are no such difficulties posed by the collection and enforcement sections found in the Act. Even though there is uncertainty as to the time frame within which the appellant is to submit its return, and in this case no return was ever submitted, but under s. 11(2) the Director General may issue an assessment without the need of a return. Therefore, an assessment may lawfully be made even without the return being

A submitted by the tax payer. Section 18 provides for appeal against an assessment under the Act. And s. 33 provides for the recovery of the tax. Therefore, it is incorrect to say that the collection and penal provisions in the Act could lead to injustice to the appellant.

B **[85]** On the question whether the Act could be regarded as excessively retrospective this will depend largely on the facts and circumstances of each case. See *J.K. Cotton Spinning and Weaving Mills Ltd. v. Union Of India* AIR [1988] SC 191. In that case the Central Government of India by a Notification in the Gazette C dated 20 February 1982 amended rr. 9 and 49 of the Central Excise Rules 1944 and s. 51, Finance Act 1982 provides that the amendments in rr. 9 and 49 shall be deemed to have, and to have always had the effect on and from the date on which the Rules came into force ie, 28 February 1944. The provision of D s. 51 of Finance Act 1982 was challenge on among other grounds that it is excessively retrospective therefore it ought to be struck down. The Supreme Court in dismissing the appeal stated that although under s. 51 of the Act the amendments to rr. 9 and 49 were given retrospective effect from 28 February 1944 but under E s. 11A(1) of the Act the excise authorities cannot recover duties not levied or not paid or short levied or short paid or erroneously refunded beyond the period of six months, therefore, the amendments could not be said to be excessively retrospective. At p. 200 it stated as follows:

F

> The apprehension of the appellant is that the amendment to rr. 9 and 49 having been made retrospective from the dates the Rules were framed, that is, from 28 February 1944, the appellants and others similarly situated may be called upon to pay enormous amount of duty in respect of intermediate goods which have come G into existence and again consumed in the integrated process of manufacture of another commodity. There can be no doubt that if one has to pay duty with retrospective effect from 1944, it would really cause great hardship but in our opinion, in view of s. 11A of the Act, there is no cause for such apprehension.

H **[86]** In the present case the Act was enacted on 31 December 1984. It was brought into force on 19 October 1984 by a deeming provision. The Act was amended by Finance (No. 2) Act 1985 which was also retrospectively enforced from 19 October 1984. The amendment was only to clarify the proviso to s. 5 of I the Act. The Act may have imposed a heavy financial burden on the appellant, however, in my judgment it is not confiscatory in character and effect. A taxing law cannot be annulled as

unreasonable merely because it is retroactive in its operation (see *Rai Ramkrishna v. State of Bihar* AIR [1963] SC 1667 or it is so excessive that it reduces the profits of the petitioner, even to the point of annihilation (see *Nazeera Motor Service v. State of U.P.* AIR [1970] SC 1124 (para 6-7); *Malwa B.S. v. State of Punjab* AIR [1983] SC 634). In *Jawaharmal v. State of Rajasthan* AIR [1966] SC 764 the Indian SC observed as follows:

> We have already stated that the power to make laws involves the power to make them effective prospectively as well as retrospectively, and tax law are no exception to this rule. So, it would be idle to contend that merely because a taxing statute purports to operate retrospectively, the retrospective operation per se involves contravention of the fundamental right of the citizen under Act 19(1) (f) or (g). It is true that cases may conceivably occur where the court may have to consider the question as to whether excessive retrospective operation prescribed by a taxing statute amounts to the contravention of the citizens' fundamental right; and in dealing with such a question, the court may have to take into account all the relevant facts and circumstances in relation to the taxation.

In the circumstances of this case I find the Act is not at all unreasonable or excessive in its character or effect or in any manner infringes on the fundamental rights of the appellant as enshrined in our Constitution.

[87] The result is that I would dismiss this appeal with costs.